JP Morgan Chase & Co. and Chase Investment Services Corp., now doing business as JP Morgan Securities, LLC, joint employers *and* Robert M. Johnson, Jennifer Zaat-Hetelle, Scott Van Hoogstraat, and Peter Piccoli.[1] Case 02–CA–098118

September 12, 2018

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On August 21, 2013, Administrative Law Judge Steven Fish issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel and the Charging Parties filed separate answering briefs, and the Respondents filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

The judge found, applying the Board's decisions in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc*., 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), that the Respondents violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing a Dispute Resolution Policy (the Policy) that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

Recently, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S. Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. Id. at__, 138 S. Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. Id. at__, 138 S. Ct. at 1619, 1632.

The Board has considered the decision and the record in light of the exceptions and briefs. In light of the Supreme Court's ruling in *Epic Systems*, which overrules the Board's holding in *Murphy Oil*, we conclude that the complaint must be dismissed.[3]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 12, 2018

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Jamie Rucker, Esq. and *Matthew Murtagh, Esq.,* for the General Counsel.

Jonathan C. Fritts, Esq. and *Stephanie Reiss, Esq. (Morgan, Lewis & Bockius, LLP),* of Washington, D.C. and *Christopher D. Havener (Morgan, Lewis & Bockius, LLP),* of Philadelphia, Pennsylvania, on brief, for the Respondent.

Michael Scimone, Esq. and *Deirdre A. Aaron, Esq. (Outten & Golden, LLP),* of New York, New York, for the Charging Parties Robert Johnson, Jennifer Zaat-Hetelle, Scott Van Hoogstraat, and Peter Piccoli.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed by Tiffany Ryan (Ryan) on August 31, 2012, in Case 02–CA–088471, Region 2 of the NLRB issued a complaint and notice of hearing on February 28, 2013, alleging that JP Morgan Chase Co. and JP Morgan Chase Bank, N.A., joint employers, violated Section 8(a)(1) of the Act by promulgating, maintaining and enforcing individual binding arbitration agreements (BAA) requiring employees to maintain as a condition of employment the signing of such agreements and by filing a motion in US District Court to dismiss a collective lawsuit filed by Ryan individually and collectively.

[1] We have amended the case caption to reflect the withdrawal of the unfair labor practice charge in Case 02–CA–088471.

[2] Chairman Ring is recused and has taken no part in the consideration of this case.

[3] We therefore find no need to address other issues raised by the Respondents' exceptions. We also find no need to pass on the General Counsel's motion to remand this case for dismissal, which is moot in light of this decision.

Pursuant to charges filed on February 11, 2013, Robert M. Johnson (Johnson), Jennifer Zaat-Hetelle (Zaat-Hetelle), Scott Van Hoogstraat (Van Hoogstraat), and Peter Piccoli (Piccoli), collectively referred to as Charging Parties, in Case 02–CA–098118, the Director issued a complaint and notice of hearing on April 3, 2013, alleging that JP Morgan Chase Co. and Chase Investment Services Corp., now doing business as JP Morgan Securities, LLC, joint employers, violated Section 8(a)(1) of the Act by maintaining and enforcing the identical individual binding arbitration agreements (BAA) as alleged in Case 02–CA–088471, requiring employees as a condition of employment the signing of such BAAs and by filing a motion in the US District Court for the Southern District, seeking to dismiss or stay a class action, which Charging Parties had joined as plaintiffs, and to compel the Charging Parties to arbitrate these claims pursuant to the terms of the BAA.

On April 25, 2013, the Director issued an order consolidating the two cases for hearing.

Answers were subsequently filed by Respondent to the complaint allegations, described above, and the trial was held before me on May 30, 2013 in New York, New York.

At the opening of the trial, General Counsel made a motion to withdraw the charge and complaint filed in Case 02–CA–088471 and that it be severed and returned to the Director for further processing. The motion was granted, and Case 02–CA–088471 was severed and remanded to the Director for further action.

The trial resumed with respect to the allegations in Case 02–CA–098118, which was completed on May 30, 2013, principally based on a stipulated record.

Briefs have been filed and have been carefully considered. Based upon the briefs and the entire record, I find as follows:

I. JURISDICTION

Respondent admits, and I find, that JP Morgan Chase Co. and Chase Investment Services Corp. (CISC) (collectively called Respondent) were joint employers of the Charging Parties and other employees employed by CISC and has been engaged in the business of providing investment banking services, derived gross revenues in excess of $500,000 and performed services valued in excess of $50,000 in states other than the State of New York and for enterprises within the State of New York.

Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. RELATED CASE: RYAN V. JP MORGAN CHASE, N.A.

As noted above, Tiffany Ryan filed a charge in Case 02–CA–088471, resulting in a complaint, alleging that JPMC violated Section 8(a)(1) of the Act by promulgating, maintaining and enforcing individual binding arbitration agreements (BAA), requiring employees to maintain as a condition of their employment the signing of such agreements and by filing a motion in US District Court to dismiss a collective action filed by Ryan, individually and collectively.

As also noted above, this complaint was severed from the instant case at the start of this trial. However, since the allegations in that case were virtually identical to the matter under consideration, including the proposed remedies, it is useful to detail the status and decision of the federal district judge in the Ryan federal court proceeding.

In that proceeding, Case 12-CV-4844-VB, Ryan had filed a collective action, alleging that JPMC violated the Fair Labor Standards Act (FLSA) by failing to compensate Ryan and others similarly situated for lawful overtime wages.

JPMC moved to dismiss the action and to compel arbitration of Ryan's claim on an individual basis pursuant to the Federal Arbitration Act (FAA).

Judge Vincent Briccetti issued a memorandum decision on February 21, 2012, granting JPMC's motion to dismiss the action and ordering arbitration under the BAA.

The decision issued by Judge Briccetti found that Ryan had signed the BAA on March 11, 2010, which conditioned her employment on agreement to the terms of the BAA, which is the identical BAA as the BAAs signed by the Charging Parties in the instant case.

The judge, in granting the motion to dismiss and to compel arbitration, considered the arguments raised by Ryan's counsel that the BAA was unenforceable because it violated the National Labor Relations Board based on *D.R. Horton*, 357 NLRB 184 (2012), the case relied on here by General Counsel in asserting that Respondent's conduct violated the Act.

Judge Briccetti rejected the assertions of Ryan in that regard, concluding that the NLRA does not determine whether Ryan has a right to bring a collective action and stated that he is joining with "numerous other courts . . . in rejecting the reasoning of *D.R. Horton,*" *Owen v. Bristol Care*, 703 F.3d 1050 (8th Cir. 2013).

III. FACTS

The Charging Parties, herein, Johnson, Piccoli, Van Hoogstraat, and Zaat-Hetelle, were employed by Respondent at the following locations: Zaat-Hetelle at Huntington Beach, California; Van Hoogstraat at Mesa, Arizona; Piccoli at Melbourne, Florida; and Johnson at Garland, Texas.

Since August 31, 2009, Respondent has issued to its employees copies of the BAA and has required its employees to enter into the BAA as a condition of their employment. The Charging Parties and Respondent entered into the BAAs on the following dates: Zaat-Hetelle on August 31, 2009; Van Hoogstraat on March 31, 2010; Piccoli on June 21, 2010; and Johnson on June 28, 2010. The BAAs signed by the Charging Parties were part of a document executed by the Charging Parties entitled, "Supervision Arbitration, Confidentiality and Non-Solicitation Agreement," which employees must sign as a condition of hire.

The BAAs executed by the Charging Parties and maintained and enforced by Respondent as a condition of employment for its employees throughout the United States contained the following terms:

> Binding Arbitration Agreement
>
> JPMorgan Chase believes that if a dispute related to an employee's or former employee's employment arises, it is better for both the individual and JPMorgan Chase to resolve the dispute without litigation. Most such disputes are resolved internally through the Firm's Open Communication Policy.

When such disputes are not resolved internally, JPMorgan Chase provides for their resolution by binding arbitration as described in this Binding Arbitration Agreement ("Agreement"). "JPMorgan Chase" and the "Firm" as used in this Agreement mean JPMorgan Chase & Co. and all of its direct and indirect subsidiaries.

As a condition of and in consideration of my employment with JPMorgan Chase & Co. or any of its direct or indirect subsidiaries, I agree with JPMorgan Chase as follows:

1. SCOPE: Any and all "Covered Claims" (as defined below) between me and JPMorgan Chase (collectively "Covered Parties" or "Parties", individually each a "Covered Party" or "Party") shall be submitted to and resolved by final and binding arbitration in accordance with this Agreement.

2. COVERED CLAIMS: "Covered Claims" include all legally protected employment-related claims that have or in the future may have against JPMorgan Chase or its officers, directors, shareholders, employees or agents which arise out of or relate to my employment or separation from employment with JPMorgan Chase and all legally protected employment-related claims that JPMorgan Chase has or in the future may have against me, including, but not limited to, claims of employment discrimination or harassment on the basis of race, color, gender, national origin, citizenship status, creed, religion, religious affiliation, age, marital status, sexual orientation, gender identity, disability, veteran status, if protected by applicable federal, state or local law or any other characteristic so protected, and retaliation for raising discrimination or harassment claims, failure to pay wages, bonuses or other compensation, tortuous acts, including, but not limited to, defamation, negligent hiring or supervision, intentional or negligent infliction of emotional distress, wrongful arrest, malicious prosecution, wrongful imprisonment, breach of privacy, tortious interference, and fraudulent inducement, wrongful, retaliatory and/or constructive discharge, breach of an express or implied contract, breach of a covenant of good faith and fair dealing, promissory estoppel, unjust enrichment, and violations of any other common law, federal, state, or local statute, ordinance, regulation or public policy, including, but not limited to Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, Section 1981 of the Civil Rights Act, the Worker Adjustment and Retraining Notification Act, and the Sarbanes-Oxley Act of 2002.

3. EXCLUDED CLAIMS: This Agreement does not cover, and the following claims are not subject arbitration under this Agreement:
(a) any criminal complaint or proceeding, (b) any claims covered by state unemployment insurance, state or federal disability insurance, and/or state workers' compensation benefit laws, except that claims for retaliation pursuant to these laws shall be subject to arbitration under this Agreement, (c) any claim under the National Labor Relations Act, and (d) claims for benefits under a plan that is governed by ERISA.

. . .

4. CLASS ACTION/COLLECTIVE ACTION WAIVER: All Covered Claims under this Agreement must be submitted on an individual basis. No claims may be arbitrated on a class or collective basis. Covered Parties expressly waive any right with respect to any Covered Claims to submit, initiate, or participate in a representative capacity or as a plaintiff, claimant or member in a class action, collective action, or other representative or joint action, regardless of whether the action is filed in arbitration or in court. Furthermore, if a court orders that a class, collective, or other representative or joint action should proceed, in no event will such action proceed in the arbitration forum. Claims may not be joined or consolidated in arbitration with disputes brought by other individual(s), unless agreed to in writing by all parties.

The arbitrator's authority to resolve disputes and make awards under this Agreement is limited to disputes between: (i) an individual and JPMorgan Chase; and (ii) the individual and any current or former officers, directors, employees and agents, if such individual is sued for conduct within the scope of their employment. No arbitration award or decision will have any preclusive effect as to issues or claims in any dispute with anyone who is not a named party

In October and November of 2012, after the Charging Parties' employment with Respondent ended, they joined a collective action lawsuit before the United States District Court for the Southern District of New York, alleging violations of the Fair Labor Standards Act and captioned Jeffrey Lloyd and Lawrence Kaufman, individually, and on behalf of all similar situated, JP Morgan Chase Investment Services Corp., Case No. 11-CV-9305 (LTS).

On January 14, 2013, Respondent filed a motion with the district court in the above action, seeking to dismiss or stay the claims of the Charging Parties and to compel them to arbitrate those claims pursuant to terms of the BAA. The instant charges were filed with the Board, as noted, on February 11, 2013.

Respondent's motion to dismiss and compel arbitration is pending before the District Court as of the close of this hearing. As also related above, an identical motion in the Ryan case, which has initially been consolidated with his matter, was granted by Judge Briccetti and arbitration was ordered in that case.

IV. ANALYSIS

A. 10b

The complaint alleges that Respondent, since at least August 31, 2009, and at all material times, has promulgated and maintained and enforced BAAs with current and former employees, which include provisions that restrict employees from joining or participating in a class action or a collective action, regardless of whether the action is filed in arbitration or in court. The complaint further alleges that, since at least 2009 and at all material times herein, Respondent has required employees to enter into the BAA as a condition of employment upon hire.

The complaint then alleges that on various dates in 2009 and 2010, the Charging Parties entered into these BAAs, as described above, as conditions of their employment.

The complaint goes on to allege that on various dates from November of 2012 through January of 2013, the Charging Parties joined a collective lawsuit in the U.S. District Court Southern District of New York, alleging violations of the Fair Labor Standards Act (FLSA), entitled *Jeffrey Lloyd and Lawrence Kaufman v. JP Morgan Chase & Co.*, and that on January 14, 2013, Respondent's motion in the US federal district court, in proceedings detailed above, seeks to dismiss or stay the claims of the Charging Parties and compel them to arbitrate their claims pursuant to the terms of the BAA.

The complaint further alleges that Respondent's conduct, described above (promulgating, maintaining and enforcing the BAAs and requiring employees, including the Charging Parties, to enter into the BAAs as a condition of their employment and filing the motion in court to dismiss Charging Parties' claims and to compel them to arbitrate) interfered, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) of the Act.

Respondent raises the affirmative defense of Section 10(b) and argues that the entire complaint must be dismissed since the Charging Parties were hired in 2009 and 2010, well outside the 6-month 10(b) period and that they signed the BAAs as a condition of their employment, also well outside the 10(b) period.

Thus, Respondent quotes the language of Section 10(b) that "no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board," and asserts that since the acts alleged as unfair labor practices, all relate to 2009 and 2010 hires of the Charging Parties and these events are well outside the 10(b) period, that the entire complaint must be dismissed.

I cannot agree.

While the complaint as drafted, and as set forth above, could reasonably be construed as alleging that pre-10(b) conduct, described above, constituted unfair labor practices, General Counsel made clear during opening statement discussions that it was not alleging that the pre-10(b) events (the hiring of the Charging Parties and conditioning their employment on signing the BAAs) was violative of the Act, implicitly conceding that these events were outside the 10(b) period and not subject to attack as independent unfair labor practices.

General Counsel asserted at trial and in its brief that it is instead contending that Respondent's continued enforcement of the BAA within the 10(b) period, including requiring employees to enter into BAAs as a condition of their employment as well as Respondent's conduct in filing its motion in federal court to dismiss Charging Parties' collective action and to compel arbitration, pursuant to the BAA, is violative of the Act and not barred by Section 10(b) of the Act.

I construe General Counsel's statements at trial as an implicit withdrawal of any allegation that the pre-10(b) conduct of Respondent was independently violative of the Act, which I shall grant. To the extent that such comments are not construed as a request to complaint allegations, I agree with Respondent that Section 10(b) would bar a complaint allegations attacking its pre-10(b) conduct (hiring Charging Parties and compelling them to sign the BAAs as a condition of their employment) and to the extent that the complaint alleges that such conduct is unlawful, it must be dismissed.

However, the complaint also alleges that "at all times material," Respondent has maintained and enforced the BAAs and required its employees to enter into the BAAs as a condition of their employment, this phrase makes it clear that Respondent's conduct within the 10(b) period, i.e. 6 months from filing of the charge of maintaining and enforcing the BAAs as a condition of employment of its employees, was at issue, and Respondent was so informed during trial. Further, Respondent's conduct of filing the motion in court to dismiss the collective action of the Charging Parties and to compel them to arbitrate individually under the terms of the BAA, clearly occurred within the 10(b) period on January 14, 2013.

The issue then becomes whether General Counsel is barred by 10(b) in attacking this conduct as well. Respondent argues that 10(b) does bar these complaint allegations based *on Local Lodge 1424 v. NLRB (Bryan Mfg.)*, 362 U.S. 411 (1960), where the Supreme Court invalidated unfair labor practice findings, which are "inescapably grounded on events predating" the 6-month period. Id at 422. Respondent argues that under *D.R. Horton* these complaint allegations depend on the circumstances at the time that the BAA was entered into, i.e. whether the Charging Parties voluntarily entered into the BAA or were compelled to do so as a condition of employment. Therefore, Respondent argues that because the Charging Parties entered into the BAAs outside the 10(b) period, the complaint allegation with respect to maintenance of the BAA and motion to compel arbitration as in *Bryan* is an effort to revise a "legally defunct unfair labor practice." Id at 416–417.

However, these contentions ignore the fact that the complaint alleges, as noted, that Respondent "at all times material," i.e. within the 10(b) period, maintained and enforced the BAA for its employee as a condition of their employment. Thus, this conduct is not inescapably grounded in the pre-10(b) events of the hiring of the Charging Parties and is, in fact, not dependent on these events at all. I, therefore, reject Respondent's contention that bars the complaint allegation that Respondent maintained and enforced the BAA as a condition of employment of its employees.

Turning to the complaint allegation that Respondent violated the Act by filing a motion to dismiss the Charging Parties' court action and to compel arbitration based on the BAA, I agree with General Counsel that this allegation is not barred by Section 10(b) of the Act since it clearly occurred within the 10(b) period.

I do not agree with Respondent's contention that since *D.R. Horton* based its finding of a violation on the fact that the BAA was entered into as a condition of employment and specifically declined to rule on whether such an agreement would violate the Act if it were not entered as a condition of employment,[1] that the allegations relating to the lawsuit depend on the circumstances existing at the time the BAA was entered into and cannot be utilized to "revise a legally defunct unfair labor prac-

[1] 357 NLRB 184, 196 fn. 28.

tice."

Respondent's argument misses two essential points. Here, the lawfulness of Respondent's conduct in filing the motion to enforce the BAA does not depend on the circumstances existing at the time that Charging Parties executed the BAAs since the BAAs on its face are unlawful as it requires that employees enter into it as a condition of their employment. Therefore, in such circumstances, the enforcement of such a contractual provision inside the 10(b) period is not barred by Section 10(b) of the Act, even though the contract was entered into outside the 10(b) period. *Teamsters Local 293 (R.L. Lipton Distributing)*, 311 NLRB 538, 539 (1993) (provision requiring extra payment of 45 cents per hour to shop stewards); *Great Lakes Carbon Corp.*, 152 NLRB 988, 989–900 (1965) (provision providing for superseniority for strikers); *Whiting Milk Corp.*, 145 NLRB 1035, 1037–1038 (1964) (unlawful seniority provision in contract executed outside 10(b) period but enforced inside the 10(b) period); *Prestige Bedding Co.*, 212 NLRB 690, 698 (1974) (discriminatory provision in contract providing benefits for only union members executed outside the 10(b) period, unlawful on its face and does not bar unfair labor practice based on continued enforcement of contractual provision within 10(b) period).

Further, it is well-established that unlawful rules maintained by employers inside the 10(b) period can be found to be unlawful, even where the rules were adopted or promulgated outside the 10(b) period. *Carney Hospital*, 350 NLRB 627, 627, 640 (2007) (handbook rules maintained and enforced within 10(b) period although adopted more than 6 months prior to filing of charge); *Automakers, Local 148 (McDonnell-Douglas)*, 296 NLRB 970, 977 (1989) (provision in union's constitution unlawful and maintenance and enforcement unlawful during the six-months period prior to filing of charges); *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1127 fn. 1 (1978) (maintenance and enforcement of unlawful no solicitation, no distribution rule not barred by 10(b) although rule promulgated outside 10(b) period).

Indeed, even if the rules were not enforced during the 10(b) period, the mere existence of the rule can be found to be unlawful since the existence of such rules tends to interfere with employee rights. *Carney Hospital*, supra at 640; *TeleTech Holdings*, 333 NLRB 402, 403 (2001); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

Finally, I note that a review of the facts in *D.R. Horton* support the conclusion that 10(b) does not bar the complaint allegations here. Although 10(b) was not discussed therein, and it was presumably not raised as a defense, the facts were remarkably similar to the facts here. In *D.R. Horton*, the charging party, Michael Cuda, was employed by D.R. Horton from July 2005 to April 2006 and his employment was conditioned on signing a mandatory arbitration agreement (MAA), which he did. In 2007, well after his employment ceased at D.R. Horton, Cuda's attorney notified D.R. Horton that his firm has been retained to present Cuda and a nationwide class of similarly situated superintendants. The attorney asserted that D.R. Horton was misclassifying its superintendents as exempt from the protections of the FLSA and gave notice of intent to initiate arbitration. D.R. Horton's counsel replied that the attorney had failed to give effective notice of intent to arbitrate, citing the language in the MAA that bars arbitration of collective claims.

The Board concluded, therein, that D.R. Horton had violated Section 8(a)(1) of the Act by maintaining the MAA as a condition of employment for its employees, even though the charging party, Cuda, had executed his MAA well outside the 10(b) period and was, as is the case with Charging Parties, here, no longer employed by D.R. Horton, the respondent, therein. I, therefore, find *D.R. Horton* supportive of my conclusion and analysis, set forth above, that 10(b) does not bar the complaint allegations in the instant case.

Accordingly, I reject Respondent's 10(b) defense and shall proceed to decide these complaint allegations on the merits.

B. Respondent's Maintenance of the BAA and Requiring Employees to Waive Rights to Pursue Collective Employment-Related Claims Collectively

The facts are undisputed that Respondent has maintained and required its employees as a condition of their employment to sign BAAs that preclude them from pursuing class actions in either arbitral or court forums and must be resolved solely on an individual basis in arbitration.

Such conduct by employers has been found by the Board in *D.R. Horton*, supra to be unlawful because it interferes with employees' exercise of Section 7 rights, the right to engage in protected concerted activity and that the right to engage in class or collective action on work-related claims constitutes protected activity. The Board concluded that "these forms of collective efforts to redress workplace or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7." Id at slip op. at 3.

The Board further concluded that since the MAA in *D.R. Horton* required employees as a condition of employment to refrain from bringing collective or class claims in any forum that the MAA "clearly and expressly bars employees from exercising substantive rights that have long been protected by Section 7 of the NLRA." Id at slip op. at 4.

The Board goes on to conclude that D.R. Horton violated the Act by requiring employees as a condition of their employment to execute the BAAs and by maintaining such agreements.

General Counsel asserts that *D.R. Horton* is dispositive and based on that decision I must find that Respondent has violated Section 8(a)(1) of the Act by engaging in virtually the same conduct as the employer in *D.R. Horton*. I agree.

Respondent makes a number of arguments and contentions as to why I should not follow *D.R. Horton* and should instead dismiss these complaint allegations. I find none of these contentions persuasive.

Respondent argues that factually the BAA, here, is distinguishable from the MAA found to be unlawful in *D.R. Horton* in that it contemplates that a court could order a class action to proceed in court, and if so, that the claim cannot be pursued in arbitration. This assertion is based on the language in the BAA, set forth above in the facts, which states that if a court orders a class action to proceed, the action should proceed in an arbitration forum. This clause appears to be related to the severability clause, Section 8, set forth below.

> 8.·SEVERABILITY: If any part of this Agreement is held to be void or unenforceable, the remainder of the Agreement will be enforceable and any part may be severed from the remainder as appropriate, except that with regard to any Party seeking to bring a claim on behalf of a class or other representative action, only a court with jurisdiction over the parties may issue a determination regarding the enforceability of the waiver in Paragraph 4 of this Agreement above, and if a court finds any waiver of same to be invalid, then the arbitration provisions stated in this Agreement do not apply. Accordingly, if for any reason the class action, collective action, and representative or other joint action waiver is found to be unenforceable, the class action, collective action, or other representative or joint action claim may only be heard in court and may not be arbitrated under this Agreement.

I do not find these sections of the BAA, in any way, affect the ultimate conclusion in *D.R. Horton* that the provisions of the BAA interfere with Section 7 rights of employees, i.e. the right to pursue and participate in class actions. I cannot agree with Respondent's characterization that the BAA "contemplates" court ordering class action proceedings. These clauses merely assert that should a court do so, arbitration cannot be used on a class basis. In any event, whether the BAA mentioned the possibility or not, a court could also find the waiver unenforceable, refuse to enforce the BAA and proceed to hear the class action suit. Thus, the statement in the BAA does not "contemplate" such an action but merely stresses that whether that occurs or not, arbitration cannot be used for a collective action.

Thus, the BAA still clearly inhibits and interferes with Section 7 conduct despite this clause. Respondent is still insisting that employees waive their rights to pursue class actions in court or arbitrations as a condition of their employment, which runs afoul of *D.R. Horton* and must be found unlawful. I so find.

Respondent also notes that *D.R. Horton* can be distinguished due to the fact that the BAA here, unlike in *D.R. Horton*, specifically excluded claims arising under the NLRA and protects employees' rights to file NLRB charges. While it is true that the Board in *D.R. Horton* found that the MAA there could reasonably be construed as restricting rights to file NLRB charges, this was an independent ground for finding the MAA to be unlawful, and the General Counsel has made no such assertion here.

The BAA is unlawful, here, not because it restricts or bars filing of NLRB charges, but because it interferes with and restricts employees engaging in protected concert conduct. Therefore, this distinction between *D.R. Horton* is insignificant, and the inclusion of the clause concerning the right to file NLRB charges in no way effects the violation of the Act encompassed by the complaint that employees are precluded from pursuing class actions in all forums, whether arbitral or judicial.

Respondent also makes procedural contentions that the Board had no authority to decide *D.R. Horton* because Member Becker's recess appointment was invalid and under the authority of *Noel Canning v. NLRB*, 705 F.3d 490 (DC Cir. 2013), and that *D.R. Horton* was also invalid because, even if Member Becker's appointment had been constitutional, it was issued by only two members without delegation to a 2-member Board, and that Member Hayes recued himself from participating. Thus, Respondent contends *New Process* Steel[2] makes *D.R. Horton* invalid.

I reject both of these contentions by Respondent. *D.R. Horton* has not been overruled and remains Board law, which I must follow, unless and until it is overturned by the Supreme Court or reversed by the Board itself.

The Board has considered the argument based on *Noel Canning* in numerous cases and held that *Noel Canning* has been rejected by some other circuits, and the question is still in litigation,[3] and pending a definitive resolution, the Board is charged with fulfilling its responsibilities under the Act. *Belgrove Post Acute Care*, 359 NLRB 633 fn. 1 (2013); *Target Co.*, 359 NLRB 953 fn. 1 (2013).

Accordingly, I reject these procedural objections raised by Respondent and conclude that *D.R. Horton* is still Board law and requires a finding that Respondent has violated the Act as alleged.

Finally, Respondent makes a further argument that *D.R. Horton* was wrongly decided and should be overturned. It notes that since *D.R. Horton* numerous federal and state court decision that have considered *D.R. Horton* since its January of 2012 decision have rejected it, including *Owen v. Bristol Care*, 702 F.3d 1050 (8th Cir. 2013) and *Ryan v. JP Morgan Chase*, supra, discussed above. Respondent contends that that NLRB has overstepped its authority in attempting to outlaw mandatory arbitration agreements, which are intended to govern non-NLRB claims. It raised a number of arguments in support of these contentions, spending a number of pages in its brief citing Supreme Court cases as well as circuit court decisions supporting its position. I shall not and need not discuss these arguments or review these precedents. Suffice to say that the Board in *D.R. Horton* carefully considered and rejected these contentions in *D.R. Horton*, and I am bound by that determination. It is true, as Respondent points out, that a number of post-*D.R. Horton* court decisions have specifically rejected *D.R. Horton*'s analysis, including the recent 8th Circuit decision in *Owen v. Bristol Care*. Indeed, *D. R. Horton* itself is under review and has been argued before the 5th Circuit, where a *Noel Canning* argument has also been raised concerning the validity of that decision.

Based on the above, it is not inconceivable that the Board will have an opportunity to revisit and perhaps change its mind about *D.R. Horton* if *D.R Horton* were to be remanded based on *Noel Canning* or on the merits by the court. It is more likely that this decision will be before the Board before any of these events occur.

In any event, the arguments made by Respondent as to why *D.R. Horton* was wrongly decided, including its rejection by courts, must be made directly to the Board and not to me. As I observed above, I am bound by *D.R. Horton* and unless and until the Supreme Court overturns it or the Board itself does so,

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[2] 130 S.Ct. 2635 (2010).

[3] Indeed, the Supreme Court on June 24, 2013, granted the petition for certiorari to review *Noel Canning*.

I must follow it and shall do so. Since I have concluded, as discussed above, that based on *D.R. Horton*'s analysis and conclusions, Respondent has violated 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that waives the right to maintain class or collective actions in all forums, whether arbitral or juridical, I reaffirm that conclusion, and I find that Respondent has so violated the Act.

C. Respondent's Filing the Motion to Dismiss the Court Collective Action and to Compel Individual Arbitration

It is undisputed that on January 14, 2013 (approximately a year after the Board issued *D.R. Horton*), Respondent filed a motion to dismiss or stay the Charging Parties' federal court collective claim, alleging violations of the FLSA, and to compel the charging parties to litigate their claims individually pursuant to the terms of the BAA.

General Counsel asserts and the complaint alleges that this conduct is further violative of Section 8(a)(1) of the Act. *D.R. Horton*, supra; *Lutheran Heritage Village*, 343 NLRB 646 (2004).

Respondent argues that these complaint allegations must be dismissed because they violate Respondent's First Amendment rights to petition the federal court in defense of the FLSA claims, which the Charging Parties have made in that court. *Bill Johnson's v. NLRB*, 461 U.S. 731, 741 (1983); *BE&K Construction*, 536 U.S. 516 (2002).

In Bill Johnson's, as extended by *BE&K*, the Supreme Court concluded that the NLRA does not prohibit lawsuits filed in state or federal courts, whether completed or still in process, unless it is both objectively baseless and undertaken with a retaliatory motive.

The Board, in assessing *BE&K Construction*, concluded in accordance with these cases that the Act prohibits only lawsuits that are both objectively and subjectively baseless in order to avoid chilling the fundamental First Amendment right to petition. *BE&K Construction*, 351 NLRB 451, 457–458 (2007); *Ray Angelini*, 351 NLRB 206 (2007).

In considering the issue of whether a lawsuit lacks a reasonable basis or is "objectively baseless," the Board applies the standards set forth in *Professional Real Estate Investors Inc. v. Columbia Pictures Industries*, 508 U.S. 49, 90 (1993), and decides whether "no reasonable litigant could realistically expect success on the merits." *BE&K*, supra at 457; *Roy Angelini*, supra, 351 NLRB at 208.

I agree with Respondent that its actions in the lawsuit, here, of seeking to dismiss the Charging Parties' collective lawsuit to compel individual arbitration of their claims pursuant to the terms of the BAA cannot be construed as lacking a reasonable basis under that standard. While the Board in *D.R. Horton* condemned the employer's conduct of compelling employees to enter into such BAAs as violative of their Section 7 rights, that was a decision of first impression and has not received support from numerous state and federal courts, including the 5th Circuit Court of Appeals. *Owens v. Bristol*, supra and the District Court opinion in *Ryan v. JP Morgan Chase*, which was initially consolidated with the instant matters. See also *Morvant v. P.F. Change's China Bistro*, 870 F.Supp.2d 831 (ND Cal May 7, 2012); *Torres v. United Health Care*, 12 CV 923 (ED NY Feb. 1, 2013). Cf. *Herrington v. Waterstone Mortgage Corp.*, 11-CV-779-BBC-2012 WL 1242318 (WD US Mar. 16, 2012), where a district court judge refused to enforce a class action waiver in an arbitration agreement based on *D.R. Horton.*

However, that is not the end of the inquiry. In *Bill Johnson's*, the Supreme Court carved out exceptions in footnotes and the *BE&K* Court left that exception undisturbed. *J.A. Croson & Co.*, 359 NLRB 19, 25 (2012).

> The footnote is as follows:
>
> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law.
>
> Petitioner concedes that the Board may enjoin these latter types of suits. Brief of Petitioner 12-13, 20; Reply Brief for Petitioner 8. Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act, see Granite State Joint Board, Textile Workers Union, 187 N.L.R.B. 636, 637 (1970), enforcement denied, 446 F.2d 369 (CAl 1971), rev'd, 109 U.S. 213.93 S.Ct. 385.34 L.Ed.2d 422 0972); Booster Lodge No. 405, Machinists & Aerospace Workers, 185 N.L.R.B. 380, 383 (1970), enforced in relevant part, 148 U.S.App.D.C. 119, 459 F.2d 1143 (1972), affd, 412 U.S. 84, 93 S.Ct. 1961, 36 L.Ed.2d 764 (1973), and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power preempts the field." NLRB v. Nash-Finch Co., 404 U.S. 138, 144, 92 S.Ct. 373, 377, 30 L.Ed.2d 328 (1971).
>
> (461 U.S. at 737, fn. 5)

The Board has frequently applied these exceptions, set forth in footnote 5 of *Bill Johnson's*, to find lawsuits or arbitrations violative of the Act and further concluded that *BE&K* does not change the applicability of these exceptions. *Sheet Metal Workers, Local 27 (E.P. Donnelly)*, 357 NLRB 1577, 15787–1579 (2011) (union violated Act by maintaining lawsuit against employer, contrary to Board 10(k) determination; Board concludes lawsuit has an illegal objective under *Bill Johnson's* exception, which ruling is unaffected by *BE&K*); *Operative Plasters, Local 200 (Standard Drywall)*, 357 NLRB 1921, 1923–1924 (2011) (conduct of union in filing for arbitration unlawful, contrary to Board's 10(k) award and in furtherance of unlawful objective under exception in Bill Johnson's, which was unaffected by *BE&K*, concludes that "here the Board has previously ruled on a given matter, and where the lawsuit is aimed at achieving a result that its incompatible with the Board's ruling, the lawsuit falls within the illegal objective exception to *Bill Johnson's*, Id at 3; *J.A. Crosan*, supra, (state court lawsuit interfering with protected conduct of union job targeting program is preempted and not protected by *Bill Johnson's* or *BE&K); Federal Security Inc.*, 359 NLRB 1, 4–14 (2012) (state court lawsuit alleging employees false testimony in Board proceeding and for malicious prosecution held preempted and that footnote

5 in *Bill Johnson's* has not been affected by *BE&K*); *Allied Trades Council (Duane Reade Inc.)*, 342 NLRB 1010, 1013 fn. 4 (2004) (union violated Act by seeking through arbitration to apply its collective bargaining to employees of Duane Reade without majority support and to force Duane Reade to recognize it in a unit, contrary to unit established by Director; Board concludes that such conduct is violative of Act and litigation with unlawful objective; it further notes *BE&K* does not affect the footnote 5 exemption in *Bill Johnson's*); *Teamster's, Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835 (1991) (union violated Act by seeking judicial enforcement in federal court of an arbitration award in direct conflict with Board's UC determination; Board applied the illegal objective exception in footnote 5 in *Bill Johnson's*); *Teamsters, Local 952 (Pepsi Cola Bottling)*; 305 NLRB 263, 269 (1991) (union violated Act by maintaining, processing and insisting on arbitration of grievances, including filing district court suit to compel arbitration, had an unlawful objective since it sought to undermine Board's prior decision in presentation case; *Bill Johnson's* does not apply in view of exception in footnote 5 for lawsuits with objective that are illegal as a matter of federal law); *Elevator Constructors (Long Elevator)*, 289 NLRB 1095, 1096 (1988) (union filing a grievance based on a contract clause in violation of Section 8(e) of Act violates 8(b)(ii)(a) of the Act; *Bill Johnson's* inapplicable since suit has an objective illegal under federal law); *Laundry Workers, Local 3 (Virginia Cleaners)*, 275 NLRB 697 (1985) (union filing state court suit to collect fines against employees, who resigned from union, violative of Act, and *Bill Johnson's* inapplicable since suit has unlawful objectives); *Teamsters, Local 705 (Energy Air Freight)*, 278 NLRB 1303, 1304–1305 (1986) (union violated Act by filing and enforcing grievance against employer in district court since it has unlawful secondary objective inasmuch as union never represented employees and no legitimate work preservation objective; this grievance and attempt to enforce it in court has unlawful objective and *Bill Johnson's* inapplicable).

It is, thus, clear, based on the above precedent, that footnote 5 in *Bill Johnson's* is still applicable and has not been changed or modified by *BE&K*. Therefore, the exceptions therein, if applicable, preclude reliance on *Bill Johnson's* or *BE&K* to warrant dismissal of the complaint here.

The preemption exception is not applicable, here, since the action was filed in federal court, and not state court, but the unlawful objective exception is clearly present.

In that regard, Respondent argues that an illegal objective of Respondent's cannot be found, here, since that "argument presupposes the answer to an issue that the Charging Parties have presented to a federal court to decide whether the BAA is enforceable under the FAA despite *D.R. Horton*. The Board cannot usurp the jurisdiction of the federal court to decide that issue. Moreover, seeking to compel arbitration based on the BAA cannot be an illegal objective because the same federal court has already rejected *D.R. Horton* and found that the BAA is lawful and enforceable under the FAA. See *Ryan v. JP Morgan Chase & Co.*, No. 12-4844-VB (SD NY Feb. 22, 2012).

I cannot agree. *D.R. Horton* is still Board law and has not been overturned by the Supreme Court, or indeed, by any court. While some courts, including the district court in Ryan and the 8th Circuit Court in *Owens v. Bristol*, disagreed with *D.R. Horton* and enforced similar BAAs, despite that Board's view that these agreements interfere with Section 7 rights of employees, these decisions are not binding on the Board or on me.

They do suggest, as I have stated above, the possibility that *D.R. Horton* may be overruled or remanded to the Board or reconsidered by the Board. But until these events occur or the Supreme Court overrules it, *D.R. Horton* is binding upon me. *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004).

I conclude that Respondent's conduct has an unlawful objective since it is contrary to *D.R. Horton* as well as *Lutheran Heritage* (enforcing unlawful rule, which explicitly restricts protected conduct). Thus, the Board has ruled on this matter, and the lawsuit is aimed at achieving a result that is incompatible with the Board's ruling and falls within the "illegal objective" exception to *Bill Johnson's*, which is unaffected by *BE&K (Standard Drywall*), supra at 1923; *E.P. Donnelly*, supra, 357 NLRB at 2.

I would also note that the Supreme Court's decision in *Bill Johnson's*, in footnote 5, specifically made reference to two cases as examples, where the lawsuit had an unlawful objective and were not subject to the analysis of the decision (baseless lawsuit and retaliatory motive). The Court cited its own decisions in *Granite State Board*, supra and *Booster Lodge No. 405*, supra, which were cases enforcing Board decisions concerning the legality of unions fining members, who had resigned from the union, for crossing a picket line. These decisions involved unsettled law as, indeed, the Court of Appeals in *Granite City* had found no violation of the Act and had reversed the Board. The Court cited these cases as examples of cases, where the unlawful motive exception applies. See also *Local 776, Teamsters v. NLRB*, 973 F.2d 230, 235–237 (3rd Cir. 1992), affirming that illegal objective is not the same as retaliatory motive.

Therefore, since here, the Board has concluded in *D.R. Horton* that the MAA (on its face) explicitly restricts Section 7 activity, any attempt to enforce such agreements, in court or in arbitration falls within the unlawful objective exception in *Bill Johnson's* and can be condemned as violative of the Act. I so find.

Accordingly, based on the foregoing analysis and precedent, I conclude that Respondent has further violated Section 8(a)(1) by enforcing its BAA by filing a motion in federal court, seeking to dismiss or stay the Charging Parties' class action lawsuit and to compel individual arbitration pursuant to the BAA.

CONCLUSIONS OF LAW

(1) JP Morgan Chase & Co. and Chase Investment Services Corp., doing business as JP Morgan Securities, LLC, joint employers, (Respondent) is and has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

(2) By maintaining a binding arbitration agreement that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

(3) By seeking to enforce its Binding Arbitration Agreement

(the Agreement) by filing a motion in federal district court to dismiss or stay the Charging Parties from collective action and to compel individual arbitration, pursuant to the terms of the Agreement, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and to take certain affirmative action designated to effectuate the policies of the Act.

Respondent will be ordered to rescind or revise its BAA to make it clear to its employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions and to notify its employees of the rescinded or revised agreement to include providing them a copy of the revised agreement or specific notification that the agreement has been rescinded.

Additionally, since the BAA has been maintained in locations throughout the country, it is appropriate to order that Respondent post the attached notice at all locations, where the unlawful BAA has been or is in effect nationwide. *Target Co.*, 359 NLRB 953, 955 (2013); *MasTec Advanced Technologies*, 357 NLRB 103, 109 (2011).

Respondent shall also be required to reimburse the Charging Parties for any litigation expenses directly related to opposing Respondent's motion to dismiss or stay the court action and to compel arbitration or any other legal action taken to enforce the BAA plus interest. Interest is to be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (DC Cir. 2011). Such a remedy is standard in cases, where the respondents have filed unlawful lawsuits or arbitrations under Board law. *Federal Security*, supra, 359 NLRB at 14; *Standard Drywall*, supra, 357 NLRB at 5; *Duane Reade*, supra, 342 NLRB at 1015.

Finally, it also is appropriate to recommend that Respondent be required to file a motion with the U.S. District Court in the Southern District of New York, an action involving Charging Parties, asking to withdraw its motion to dismiss or stay their claims and to compel arbitration of these claims. *Federal Security*, supra, 359 NLRB 1, 14 fn. 123; *E.P. Donnelly*, supra, 357 NLRB 1577, 1581; *Standard Drywall*, supra, 357 NLRB 1921, 1924; *Webco Industries*, 337 NLRB 361, 365–366 (2001); *Rite Aid*, supra, 305 NLRB 832, 835–836, enf. 973 F.2d 230 (3rd Cir. 1992); *Duane Reade*, supra, 342 NLRB at 1013, 1014.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

A. The Respondent, JP Morgan Chase & Co. and Chase Investment Services Corp., doing business as JP Morgan Securities, LLC, joint employers, its officers, agents and representatives shall

1. Cease and desist from

(a) Maintaining or enforcing a binding arbitration agreement (the Agreement) that waives the right to maintain class or collective action in all forums, arbitral and judicial.

(b) Enforcing such agreements by filing motions in court to dismiss or stay collective action lawsuits or arbitrations and to compel individual arbitration, pursuant to the terms of the Agreement.

(c) Requiring employees to sign binding arbitration agreements that prohibit collective and class litigation in all forums, arbitral and judicial.

(d) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 7 days after the Board Order, file a motion with the United States District Court in Case No. 11-CV-9305 (LTS), asking to withdraw its motion to dismiss or stay the claims of Robert M. Johnson (Johnson), Jennifer Zaat-Hetelle (Zaat-Hetelle), Scott Van Hoogstraat (Van Hoogstraat), and Peter Piccoli (Piccoli) (collectively the Charging Parties) and to compel arbitration of these claims or otherwise raise the Agreement as a defense to the claims of the Charging Parties in that action.

(b) Reimburse Johnson, Zaat-Hetelle, Van Hoogstraat, and Piccoli for any legal and other expenses incurred related to opposing Respondent's motion to dismiss and to compel arbitration or any other legal action taken by Respondent to enforce the Agreement, plus interest as described in the remedy section of this decision.

(c) Rescind or revise nationwide the Binding Arbitration Agreement to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions.

(d) Notify its employees of the rescinded or revised agreement by providing them a copy of the revised agreement or specific notification that the agreement has been rescinded.

(e) Within 14 days after service by the Region, post at its Huntington Beach, California, Mesa, Arizona, Melbourne, Florida and Garland, Texas facilities and any other facility, where the Binding Arbitration Agreement has been in effect, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 11, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 21, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a binding arbitration agreement (the Agreement) that waives the right to maintain class or collective action in all forums, arbitral, and judicial.

WE WILL NOT enforce such agreements by filing motions in court to dismiss or stay collective action lawsuits or arbitrations and to compel individual arbitration, pursuant to the terms of the Agreement.

WE WILL NOT require employees to sign binding arbitration agreements that prohibit collective and class litigation in all forums, arbitral and judicial.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

WE WILL within 7 days after the Board Order, file a motion with the United States District Court in Case No. 11-CV-9305 (LTS), asking to withdraw our motion to dismiss or stay the claims of Robert M. Johnson (Johnson), Jennifer Zaat-Hetelle (Zaat-Hetelle), Scott Van Hoogstraat (Van Hoogstraat), and Peter Piccoli (Piccoli) (collectively the Charging Parties) and to compel arbitration of these claims or otherwise raise the Agreement as a defense to the claims of the Charging Parties in that action.

WE WILL reimburse Johnson, Zaat-Hetelle, Van Hoogstraat, and Piccoli for any legal and other expenses incurred related to their opposing our motion to dismiss and stay and to compel arbitration or any other legal action taken by us to enforce the Agreement, plus interest as described in the remedy section of this decision.

WE WILL rescind or revise nationwide the Binding Arbitration Agreement to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions.

WE WILL notify our employees of the rescinded or revised agreement by providing them a copy of the revised agreement or specific notification that the agreement has been rescinded.

JP MORGAN CAHSE & CO.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-098118 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.